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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

JOHN EARL RUMMEL,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court err in denying Petitioner's Motion for Judgment of Acquittal as the evidence was insufficient?

2. Did the trial court err in calculating the loss amount and applicable guidelines in sentencing Petitioner?

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES ..... iv, v
OPINION BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 1
REASONS FOR GRANTING WRIT 7
OVERVIEW 7
ARGUMENT I 9
ARGUMENT II 16
CONCLUSION 21
CERTIFICATE OF SERVICE 22

INDEX TO APPENDICES

Appendix A - Opinion of the United States Court of Appeals for the Fifth Circuit, Docket #96-10518 entered November 19, 1997, *United States v. John Earl Rummel*, (5th Cir. 1997).

Appendix B - Opinion of the United States Court of Appeals for the Fifth Circuit denying Petitioner's Suggestion for Rehearing *En Banc*, dated January 7, 1998.

Appendix C - Statutes and Sentencing Guidelines provisions.

TABLE OF AUTHORITIES

CASES

Bifulco v. United States, 447 U.S. 381 (1980) 19
United States v. Anaya, 32 F.3d 308 (7th Cir. 1994) 17
United States v. Blackburn, 940 F.2d 107 (4th Cir. 1991) 19
United States v. Butler, 41 F.3d 1435 (11th Cir. 1995) 17
United States v. Davis, 61 F.3d 291 (5th Cir. 1995) 11
United States v. Dean, 59 F.3d 1479 (5th Cir. 1995),
cert. denied, ___ U.S. ___, 116 S.Ct. 794 (1996) 16, 21
United States v. Flores-Chapa, 48 F.3d 156 (5th Cir. 1995).9, 15
United States v. Gardea Carrasco, 830 F.2d 41 (5th Cir. 1987)11
United States v. Gibson, 55 F.3d 173 (5th Cir. 1995) 11
United States v. Greene, 41 F.3d 383 (8th Cir. 1994) 17
United States v. Hammer, 3 F.3d 266 (8th Cir. 1993),
cert denied, ___ U.S. ___, 114 S. Ct. 1121 (1994) 17
United States v. Hooten, 942 F.2d 878 (5th Cir. 1991) 18, 21
United States v. Jackson, 700 F.2d 181 (5th Cir.),
cert. denied, 464 U.S. 842 (1983) 10
United States v. Jaramillo, 42 F.3d 920 (5th Cir. 1995) 9
United States v. Jimenez, 77 F.3d 95 (5th Cir. 1996) 9
United States v. John Earl Rummel, (5th Cir. 1997),
Docket #96-10518 entered November 19, 1997 iii
United States v. Martinez, 946 F.2d 100 (9th Cir. 1991) 19
United States v. McMeen, 49 F.3d 225 (6th Cir. 1995) 17
United States v. Menesses, 962 F.2d 420 (5th Cir. 1992) 9
United States v. Moron, 649 F.2d 309 (5th Cir. 1981) 11
United States v. Narvaez, 38 F.3d 162 (5th Cir. 1994) 18
United States v. Patten, 40 F.3d 774 (5th Cir. 1994) 18
United States v. Polk, 56 F.3d 613 (5th Cir. 1995) 11
United States v. Puig-Infante, 19 F.3d 929 (5th Cir. 1994),
cert. denied, ___ U.S. ___, 115 S. Ct. 180 .....18, 21
United States v. Rivers, 929 F.2d 136 (4th Cir. 1991),
cert. denied, 502 U.S. 964 19
United States v. Stanley Harrison Asibor, 1997 WL 138910,
(5th Cir. 1997) 9
United States v. Thomas, 973 F.2d 1153 (5th Cir. 1992) 18
United States v. Vermea, 30 F.3d 1539 (5th Cir. 1994),
cert. denied, ____ U.S. ____, 115 S. Ct. 1835 (1995) 11

United States v. Williams, 41 F.3d 496 (9th Cir. 1994) 17
United States v. Wimbish, 980 F.2d 312 (5th Cir. 1992),
cert. denied, 508 U.S. 919 (1993) 16

STATUTES

Title 18, United States Code, Section 287 ..... 1, 19
Title 18, United States Code, Section 371 19
Title 28, United States Code, Section 1254(1) 1

GUIDELINES

United States Sentencing Guideline, Section 2F1.1 6
United States Sentencing Guideline, Section 2F1.1(b)(1)(G) 7
United States Sentencing Guidelines, Section 2F1.1(b)(2) 7

PETITION FOR WRIT OF CERTIORARI

Petitioner, John Earl Rummel (Rummel), respectfully prays that a writ of certiorari issue to review the opinion of the Court of Appeals filed November 19, 1997, which affirmed Rummel's conviction.

OPINIONS BELOW

The opinion below, *United States v. John Earl Rummel*, No. 96-10518 (5th Cir. 1997) is unreported pursuant to Fifth Circuit Local Rule 47.5.4. The unpublished manuscript opinion of the Fifth Circuit is attached as Appendix A. The Order denying the Suggestion for Rehearing En Banc, dated January 7, 1998, appears in Appendix B to this Petition.

JURISDICTION

The opinion of the Court of Appeals (Appendix A) was filed on November 19, 1997. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution (See Appendix C for full text):
Fifth Amendment
United States Code (See Appendix C for full text):
Title 18, United States Code, Section 2
Title 18, United States Code, Section 287
Title 18, United States Code, Section 371
Title 28, United States Code, Section 1254(1)

STATEMENT OF THE CASE

A. Proceedings Below

This case flows out of a complex and self-contradictory thousand page 1988 Government contract under which Texas Engine Xchange, Inc. (TEXI) rebuilt 55 diesel engines.

In the summer of 1993 Rummel and his brother, Bill

Rummel, were interviewed by Special Agent Don Varner. Rummel testified before the Grand Jury on October 26, 1994 and a four count Indictment was returned against Rummel, Jeff D. Moore ("Jeff Moore") and Eddie C. Moore ("Eddie Moore"). Jeff Moore and Eddie Moore were also charged with conspiracy to commit violations of 18 U.S.C. §§ 287, 1001 and 2; the Grand Jury no-billed Rummel on this charge.

On November 9, 1994 Rummel made his initial appearance and was released on his Personal Recognizance. The Honorable Eldon B. Mahon, Senior Judge, United States District Court, entered an order finding the case to be complex and passed it to August 14, 1995; trial concluded on August 25, 1995. Rummel was convicted on Counts 2, 3, and 4 and sentenced to a term of 18 months on April 22, 1995. Jeff Moore was convicted on all four counts. Eddie Moore was acquitted of Count 1 and found guilty of Counts 2, 3, and 4.

On April 30, 1996, Judge Mahon entered an Order changing his findings. Rummel timely filed Notice of Appeal and on May 29, 1996 Judge Mahon granted Rummel's Motion for Release.

The Fifth Circuit (Circuit Judges Jolly, Davis, Barksdale) issued its Opinion (Appendix A) on November 14, 1997 affirming and denied Rummel's Suggestion for Rehearing *En Banc* on January 7, 1998 (Appendix B). Mandate was issued on January 15, 1998; Motion to Recall and Stay the Mandate was denied on February 20, 1998.

B. Statement of the Relevant Facts

Texas Engine Exchange, Inc. ("TEXI") rebuilt industrial diesel engines. Rummel (45) had been working at TEXI since 1976, had worked with heavy equipment most of his life, traveled in Nigeria, West Africa, and Alaska (where he was an equipment supervisor on the Alaskan Pipeline), had worked on the Pueblo Dam, is a master mechanic, had been project manager at numerous other companies and spent three years in the Navy as a heavy equipment operator.

Rummel had been away from TEXI on a project in India and contracted an illness which put him in the hospital for three months. During his illness Bill Rucker served as President

of TEXI, bid on the government contract but received a "No Award" recommendation because of various deficiencies at TEXI (such as not having familiarity with the 1,000 page government contract which set forth military specs). The government review noted that TEXI was very successful until the collapse of the petroleum-related industries and felt that he needed $200,000 additional funds to satisfy the government that he could complete the contract.

The proposal made by TEXI contemplated that they would purchase 55 used 290 Cummins truck engines which would be steam-cleaned, oil drained and delivered to TEXI, where they would be rebuilt. The government held out the promise of a contract for 1,100 engines, with the understanding that the contractor, under the first contract, would purchase and rebuild 55 used Cummins diesel engines at a price of slightly less than $10,000 each, a second set of 55, and could then get a contract for 1,000 more.

When Rummel returned from the hospital and again took charge, he could not provide the $200,000 additional funding which the government had added as a last-minute requirement and, accordingly, he sought financial help through Roger Davidson, who thereby obtained 51% control of the company.

Rummel delivered the original "Article One" engine to Fort Carson. In testing the "Article One" engine, the Army discovered that some of its own specifications were erroneous, that Army GI's had installed oil lines backwards, made other errors, and praised Rummel for laboring on the Army's site for days to correct these errors. The Trip Report of the Fort Carson "Article One" engine testing and installation in a dump truck, signed by Karen L. Rossell, a military specialist, recited the incidents mentioned above, and went on to note, in reference to Rummel, that

> "'The contractor representatives were extremely dedicated and knowledgeable. Most of the removal and installation was done by the contractor personnel with most of the contractor's tools. Prior to installation, arrangements had been made between TACOM"s AMSTA-QWC, and Army personnel of 52nd Battalion.

> Upon arrival, the Army gaining activity was 'down range,' and TACOM LAR assigned to this unit was TDY.'"

The next several pages were devoted to a number of helpful changes being recommended by Rummel (several without additional charge to the government) and the report noted that Rummel was "interested in buying old military engines to rebuild rather buying commercial engines off the street for rebuilding."

In August of 1989, Davidson relieved Rummel of running the shop and put Jeff and Eddie Moore in charge (Jeff to be the company's business manager and Eddie to be the shop manager, in charge of inventory). From then on Rummel was assigned work on other engines. Rummel had no part in activities the government claimed were fraudulent, such as ordering oil pans from Mexico or ordering engines from Truck & Trailer Parts (TTP). He signed off on testing certification in the normal course of business when other employees had performed their individual tasks and had so certified by their signatures. The paperwork forwarded to the government specified who had done particular inspections. There was no evidence that any of these procedures and inspections had not been accomplished or that any of the parts so inspected or tested had in any way failed. Rummel signed certifications for engines made at TTP, knowing they had performed those inspections and the testing required but acknowledged he did not *see* the other workers completing their part.

When the Army notified the company that they were behind schedule, Jeff Moore subcontracted out construction of a number of engines so that those, coupled with the ones being rebuilt at TEXI, would allow them to complete the first contract for 55 engines on time and therefore be eligible for further contracts, where the real money was. He went to TTP in Indiana, a highly reputable firm which advertises nation-wide and supplies re-built and re-manufactured engines, of various manufacturer brands, to the industry. He arranged to buy 30 rebuilt Cummins 290 engines. These were tested on the dynamometer for horsepower output and fuel consumption by TTP in Indiana before being shipped to TEXI.

Rummel learned of that decision only when the first set of ten engines arrived from the subcontractor's office and expressed his annoyance that he and his employees were therefore not benefiting from the labor portion of the contract as to the engines built off-site.

In January of 1991 Jeff Pollitt, who had been hired by the new owners, terminated Charles "Skip" Bridges, Grover Lowrey and Elmer Bruce. They immediately threatened to "get even," to get the Moore brothers, etc., and began initiating a Whistle-blower lawsuit against the company for alleged improprieties occurring after the Moore brothers took over management of the business under Davidson.

In May of 1992 the Government initiated an investigation, during which Agent Varner interviewed Rummel, who candidly answered questions and acknowledged that he had signed certifications (which was his responsibility once other individuals had each checked that they had performed that portion of the work assigned to them), that he had lost his business to Davidson and that, after the Moore brothers took over, he saw engines built off-site arrive and was aware that some of the employees were grinding off a "Made in Mexico" stamp on some engine oil pans. There was a dispute between witnesses as to whether oil pans were available in the United States, whether other reputable rebuilders used such oil pans, etc.. Rummel had no part in the decision to use those or to grind off the designation.[1]

Several years later Rummel and his brother Bill Rummel received target letter to appear before the Grand Jury. Rummel appeared before the Grand Jury and repeated the same information. AUSA Jarvis took the position that, since he had seen the grinding off "Made in Mexico" and knew engines were built off-site, he should have said something, etc. The Grand Jury declined to indict Rummel for conspiracy. Bill Rummel's case was dropped.

Beginning with the Opening Statement, presentation of testimony, and introduction of charts that the prosecutors

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[1] The Government witness Dickerhoff testified they often use oil pans made in Mexico.

themselves had made, the Government claimed TEXI violated contract provisions by "having engines built at TTP," using "foreign" made parts in violation of the "Buy American Act," "falsifying" dynamometer test results, "hiding" boxes which had contained after market parts, utilizing "used" parts in re-building the engines, using unacceptable engine brakes (devices which use the back pressure of an engine to slow the vehicle), improperly "manipulating" the fuel pump adjustments, shipping engines without all parts in place, falsifying magnaflux testing results, and "falsely filling out quality assurance inspection" and other forms.

In fact, the contract specifically contemplated "rebuilding" the engines by utilizing *all* used parts (except for specific itemized minor parts, such as, washers, gaskets, seals, etc., and any parts that were damaged or other wise not reusable)., did not contain the "Buy American" provision the Government claimed, and specifically permitted sub-contracting work out (all of which is fully set forth below). The Original Engine Manufacturer ("OEM"), Cummins, in fact utilized "foreign made parts" made in England or Germany and utilized parts manufactured by other manufacturers in assembling the "OEM" engines. This did not dissuade the Government from maintaining the position that all of these activities were criminal. The actual contract was ignored by the Government.

There never was any testimony or other evidence presented that the engines were defective. In fact, of all 55 engines produced by TEXI, only one warranty claim had ever been made by the Army, in the form of a "Quality Deficiency Report," pertaining to an engine turbocharger failure. Special Agent Varner, employed by the U.S. Army's Criminal Investigation Division, testified there was only one warranty claim, but he had no knowledge of how that claim or any QDR in this case was resolved. That turbocharger was replaced, at no cost to the Government, promptly, as a warranty-covered item even though the warranty period had expired. Testimony showed that, during the course of the pre-indictment investigation, the Government located only one engine (number 47) and sent it for inspection and testing. The results of this

inspection, testing, photographs or any other evidence pertaining to the number 47 engine was not, however, offered at trial (although photographs were shown to the defense during discovery).

The sentencing hearing on all three defendants took place on April 22, 1996. The District Court held that U.S.S.G. § 2F1.1 was the applicable guideline for sentencing, which calls for a base offense level of 6. The "more than minimal planning" enhancement was applied, thereby raising the offense level to 8. U.S.S.G. § 2F1.1(b)(2). Finally, the court enhanced 6 levels for amount of loss under U.S.S.G. § 2F I. I (b)(1)(G).

The District Court used, for purposes of enhancement, a loss figure of $93,000, derived by subtracting the "actual cost" to TEXI from what the trial court found Mitch Ousley and Richard Dickerhoff had testified an engine constructed with OEM parts would cost. The District Court found that, of the 55 engines under contract, one, the "First Article Engine," conformed to contract requirements and that the evidence regarding the other 24 engines was "too speculative to support a finding that they had a specific value less than that called for in the contract."

REASONS FOR GRANTING THE WRIT

OVERVIEW

The Government, beginning in pretrial hearings, Opening Statements, continuing through the direct examination and cross-examination of witnesses, in Final Argument, and at Sentencing ignored the actual contract and continued to characterize as "criminal" and "fraudulent" allegations which were, *ab initio*, founded on a mistaken understanding of the contract and facts relative to the "rebuilding" as opposed to "remanufacturing" of diesel engines. Despite clear language in the contract, buttressed by all unbiased witnesses and the Government's own criminal investigator and quality assurance specialist, persisted in claiming that the use of "used" part instead of "new" parts was evidence of criminal fraud. By leading, misrepresenting, and disregarding witness testimony, arguing outside the record, misrepresenting the statutory provisions of the Whistle Blower Act, the very existence of a civil

lawsuit, and commented on Rummel's failure to present evidence, and through a barrage of objections, and intimidation of witnesses in the Grand Jury and outside the courtroom during the trial, deprived Rummel of Due Process and a fair trial.

The Government found and inspected only one of the 55 engines which were delivered but never offered any evidence of that inspection at the trial. The prosecutor prepared many of his own charts and, having committed to a "theory of the case" in the Indictment and in Opening Statements, persisted in that theory even when it was demonstrably erroneous.

The evidence as to Rummel was insufficient. Although he was not charged in the conspiracy count of the Indictment, and despite the fact that the evidence showed that while he was "present at the scene" and may have had "knowledge" of (allegedly fraudulent) acts performed by other individuals, the Government did not present any proof whatsoever of a criminal intent, of a knowing and intentional motive, and/or action on the part of Rummel, to "defraud" the United States government or to make false statements with such intent or knowledge. The evidence showed that Rummel was not the original bidder on the contract, delivered the First Article Engine (which was correct), participated in building the next ten engines (as to which there was no finding of fraud), and had no foreknowledge that any engines would be built by TTP (even if that were an offense).

The trial judge, who had adopted the Government's initial theory, curtailed cross-examination of key government witnesses which would have revealed their bias and motive for testifying falsely, to protect themselves because they received immunity based on a version which assisted the Government, and the financial rewards they hoped to gain by getting a percentage, under the Whistle-Blower Act, which would have been a significant amount in relation to their standard of living.

These questions were clearly within the scope of proper cross-examination for impeachment. The trial judge insisted that he would not allow the defense "to try the civil case" during the criminal trial, and compounded the error by making statements to the jury informing them that the civil case had nothing to do with the criminal case. Furthermore, the trial judge unduly restricted defense counsel in attempting to

develop testimony by insisting that witnesses could only give "yes" or "no" answers or that they could only testify as to their "personal knowledge" even if they were qualified as expert witnesses.

In imposing sentence the trial judge erroneously assumed that the contract under which the engines were rebuilt required the use of new (expensive) parts when, in fact, it did not. When this was specifically raised at sentencing the trial judge confirmed his belief that new parts were required. Subsequently, after imposing sentence, the trial court issued a letter to "clarify" his earlier statement. The U.S. Probation Officer's Report and the subsequent rulings by the trial court relied on the statements of investigators, and their understanding of the contract, as opposed to the actual contract itself and expressed his erroneous belief that compliance with the contract required the use of all new parts. He did not correct that until after sentencing. Therefore the "amount of loss" was overstated, resulting in application of a higher guideline level than what was appropriate under the facts of the case.

ARGUMENT

1. Did the trial court err in denying Petitioner's Motion for Judgment of Acquittal as the evidence was insufficient?

United States v. Stanley Harrison Asibor, 1997 WL 138910, (5th Cir. 1997) held:

> "the standard of review for determining whether there was sufficient evidence to convict a defendant is whether the evidence, when reviewed in the light most favorable to the government with all reasonable inferences and credibility choices made in support of a conviction, allows a rational fact finder to find every element of the offense beyond a reasonable doubt. *United States v. Flores-Chapa*, 48 F.3d 156, 161 (5th Cir. 1995). The evidence is viewed in the light most favorable to the verdict, accepting all credibility choices and reasonable inferences made by the trier of fact which tend to

support the verdict. *United States v. Jimenez*, 77 F.3d 95, 97 (5th Cir. 1996)."

However, a conviction cannot stand if the evidence, construed in favor of the verdict, "gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged." *United States v. Jaramillo*, 42 F.3d 920 (5th Cir. 1995). *United States v. Menesses*, 962 F.2d 420, 426 (5th Cir. 1992). The trial jury could not have found "each essential element of the offense" beyond a reasonable doubt, *United States v. Jackson*, 700 F.2d 181,185 (5th Cir.), *cert. denied*, 464 U.S. 842 (1983). The review is *de novo* review of a sufficiency of the evidence claim, to determine whether a reasonable trier of fact could have found that the evidence established the defendant's guilty beyond a reasonable doubt.[2]

Defense counsel Durrance, representing Eddie Moore, through a motion in limine and joined by all counsel, filed prior to jury selection, argued that:

> "allowing the government to question witnesses and basically obtain a conviction based on a civil standard and not the criminal standard . . .if the government is allowed to ask witnesses whether or not the contract was breached . . .there were after market parts . . .bootleg parts . . . in conformity or not in conformity with the contract . . ." was improper.

The Government, throughout the trial, was permitted to dilute the standard necessary to prove a civil breach of contract with the criminal burden called for in convicting for fraud.

Although it had been brought to the trial court's attention previously, and the Indictment did *not* so provide, the trial court, in summarizing the Indictment, erroneously noted that the Indictment alleged a criminal conspiracy between all three defendants. The trial court repeated this, in taking the pleas before the jury, asking Rummel his plea to "each of these four counts." This was corrected after objection but the process

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[2] When the jury delivered their verdict, three jurors, O'Flaherty, Frair and Iven started crying when polled as to whether they supported the verdict as to Rummel. The Juror Frair, at first, did not answer and then mumbled so that the trial court had to ask her again, at which point she stated yes.

nonetheless treated Rummel as if he were a conspirator throughout the trial, continuing even into the PSI prepared by U.S. Probation Officer Vicki McMillan.

The United States Court of Appeals for the Fifth Circuit has adopted the standard that "a conviction may rest solely on the uncorroborated testimony of one accomplice if the testimony is not insubstantial on its face." *United States v. Moron*, 649 F.2d 309, 312 (5th Cir. 1981). *United States v. Gibson*, 55 F.3d 173, 181 (5th Cir. 1995), *citing United States v. Gardea Carrasco*, 830 F.2d 41,44 (5th Cir. 1987). However, in citing that proposition, that Court in *United States v. Davis*, 61 F.3d 291, 297 (5th Cir. 1995) noted that that defendant's role in the enterprise was

> "corroborated by taped telephone conversations. . .financial data from. . .bank records and Western Union records. The abundant evidence concerning Jefferson's role in the conspiracy and the income he derived from it was sufficient to support the CCE conviction."

The case law applicable to the admissibility of accomplice testimony has eroded from a standard of prohibiting conviction "without independent corroboration," to allowing conviction so long as the jury believed such uncorroborated accomplice testimony "beyond a reasonable doubt." Rummel recognizes that other cases have previously held that "non-credibility" is generally not a sound basis for alleging insufficiency of the evidence, *United States v. Polk*, 56 F.3d 613, 620 (5th Cir. 1995), and that "a guilty verdict may be supported only by the uncorroborated testimony of a co-conspirator, even if the witness is interested due to a plea bargain or promise of leniency, unless the testimony is incredible or insubstantial on its face." *United States v. Vermea*, 30 F.3d 1539, 1552 (5th Cir. 1994), *cert. denied*, ____ U.S. ____, 115 S. Ct. 1835 (1995). It is submitted that the testimony in this case was incredible or insubstantial on its face, that the jury must follow its instructions, and that provisions for setting aside their verdict and granting a motion for judgment of acquittal existed for good reasons.

During pretrial hearings the trial judge had expressed his amazement that the Government had not been able to find 54 of the 55 engines which had been purchased for more than a half

million dollars and noted that he certainly hoped the Government did not attempt to go forward on that basis. Varner had testified in the Grand Jury and at a pretrial hearing that he might still be able to find the engines, but the "Army thought that it would not be cost-effective to do so," that when his investigation began, the engines could have been out in the field for up to approximately three years. Quality Assurance Inspections were required to be done per regulations every ninety days to check the oil of engines in the field, according to a book detailing the procedure and a video tape made by the Army to create proper records, and that the failure of the one turbocharger occurred after the two year warranty period had expired.

The trial judge overruled proper objections calling for Agent Varner, on re-direct, to speculate as to what might have happened to the engines after he had testified he did not know. When he went into an area that had not even been touched on either the Government's direct examination or any cross-examination, the trial court overruled proper objections even when it was totally beyond the scope of cross-examination. This was particularly damaging because it made it appear to the jury that counsel was attempting to hide a fact about which Rummel had testified truthfully in the Grand Jury, as to which he had no personal involvement and, *unless he was charged with conspiracy*, was not relevant as to any culpability on his part. In fact, on re-cross-examination by counsel for Rummel, Varner admitted that Rummel had told him he did not know if it was true or not that any boxes were destroyed, but when Varner had asked him to give him all the information he could, Rummel told him that he had "heard about that," and agreed that, based on that by itself, we could not even determine if it ever happened.

When Government Witness Trimble testified, in response to a leading questions from AUSA Jarvis, if he was in an area when there was a discussion about oil pans and grinding on oil pans, and objections to that question were overruled, the witness testified that "Jeff and Eddie noticed an oil pan that had a Mexico stamp on it" and "Eddie pointed it out and Jeff was nearby, and they both looked at it and told Elmer to go get his

grinding stone and grind it down" (Elmer being the Elmer Bruce whistle blower). Asked if he saw that sort of activity on one occasion or more than one occasion, he answered "to my best knowledge just once while I was out there" and that no one else was around, but that "Elmer. . .if he found one he would grind it down."

The prosecution assumed that, while the fuel flow was adjusted on the Cummins diesel oil pump, by adjusting it at the engine, while a second person would be watching the results on a dynomometer to record the specific horsepower achieved at each rpm setting, that if the computer operator indicated he wanted more, and "more" was not available, the computer results must then have been falsified. In fact, the test is calculated to run the engine through its entire range of capabilities, as evidenced by documents and testimony admitted into evidence. The Government preferred to ask witnesses, regardless of their qualifications or lack of qualifications, to answer questions without referring to the contract, the documents that have been put into evidence, or offering any photographs, engine parts, or other tangible evidence. In any event, it is clear that only "Jeff and Grover" ran the computer.

During cross-examination of Trimble he testified, when asked whether engines he built failed, some did, but were crated anyhow without being fixed, simply painted and shipped out. Asked whether he had testified under direct examination that he took pride in the work he did, but was now saying that engines he built that "blew up" were just painted over and put out the door that, "didn't blow up. They weren't up to the specs that the government wanted." which he based on the fact that he believed the computer readings were not correct.

Bridges, one of the whistle-blower government witnesses testified that he had nothing to do with acquisition of parts for the engines, but acknowledged he picked up parts, called for quotes for pricing over the phone, could not recall which local suppliers he telephoned and, even though he was characterized as the liaison between the government and TEXI, stated he had never read the 800 page government contract but had "skimmed through it. . .to make himself familiar with it," but did not "understand all of it" when asked on re-direct by the

prosecution.

Bridges testified on direct that based on page 20 of Government's Exhibit Number 1, he believed that all engines had to be manufactured at TEXI facility. On cross-examination by Rummel he testified as follows:

Now, directing your attention, also, to page 20. And to save some time, let me ask you, the X that is marked says alternate I or alternate I (Apr 1984) Add paragraph (I) to basic clause:' Do you see where I'm reading?

A. Yes, sir.

Q. Small I., 'the contractor shall produce both the first article and the production quantity at the same facility and shall submit a certification to this effect with each first article.' That's what is says there; right?

A. Yes, sir, that's correct.

Q. Let me ask you to now turn with me to page 62 of the contract that you've been asked about earlier. And that rather than being dated April 1984 is dated October 1987; is that correct"

A. Sir, are you on page 62?

Q. Yes, sir.

A. Oh, yes, sir, I see. Yes, sir, it's dated 8 October of '87.

Q. Right. And it says by the limitations on subcontracting, 'By submission of an offer and execution of a contract, the offerer/contractor agrees that in performance of the contract in the case of a contract for. . .(a) services 9 except construction;, at least 50 percent. . .And then (b) says , 'supplies (other than procurement from a regular dealer in such supplies), the concern shall perform work for at least 50 percent of the cost of manufacturing.. . .And then (c), 'General construction, the concern will perform at least 15 percent of the cost of the contract. . .and then subsection (d) says, 'construction by special trade contractors, the concern shall perform at least 25 percent of the cost of the contract. . .Now it says that; right?

A. Yes, sir.

Q. Well, sir, how do you decide whether or not if you contract out, having built some of the engines, how do you tell whether you're in compliance with section -- page 62, the 1987 provision, or whether you're therefore not in compliance with page 20, the 1984 provision? How do you -- how do you, as liaison for the company, how do you resolve that dichotomy, that contradiction there?

A. I cannot answer that question. I don't know."

Furthermore, Bridges acknowledged that the 800 page contract contained "different provisions that conflicted with each other. . .demonstrated by the subcontracting provisions. . .the provisions as to whether the. . .other engines that followed after the first article had to be exactly like the first article. . .[or]. . .the first article shall not be the standard by which you judge the other engines."

A reasonable jury could not have convicted following the trial court's other standard instructions, requiring "proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs." Here, it is not necessary to recite the litany of items which *were* presented at trial to demonstrate that the Government had no case against Rummel without the testimony of the whistle-blowers.

The evidence as to Rummel was insufficient. Although he was not charged in the conspiracy count of the Indictment, and despite the fact that the evidence showed that while he was "present at the scene" and may have had "knowledge" of (allegedly fraudulent) acts performed by other individuals, the Government did not present any proof whatsoever of a criminal intent, of a knowing and intentional motive, and/or action on the part of Rummel, to "defraud" the United States government or to make false statements with such intent or knowledge. The evidence showed that Rummel was not the original bidder on the contract, delivered the First Article Engine (which was correct), participated in building the next ten engines (as to which there was no finding of fraud), and had no foreknowledge that any engines would be built by TTP (even if that were an offense).

Even reviewing the evidence in the light most favorable to the Government, a rational fact finder could not find every element of the offense beyond a reasonable doubt as to Rummel in this case. *Flores-Chapa, supra.*

This Court must reverse because the Panel below did not address the main issue raised by this case, that being the fact that the prosecutor, in statements to the trial court and to the jury, and through the testimony of witnesses, obtained a conviction based on a civil standard, that is, the trial dealt not with whether any evidence of criminal intent as to Rummel existed, but rather whether some contractual provision was breached. In fact, when the Government's expert was questioned whether there would be any harm to the Government if better engines were built by more qualified people at the TTP shop, the Government's objection, "that's not the issue in this case," was sustained, telegraphing to the jury that the issue was whether the *contract* had in some measure been violated, rather than whether such violation occurred with the intent to defraud the Government of receiving the value for which it paid. The United States Court of Appeals erred in not reversing the trial court's overruling of Rummel's Motion for Judgment of Acquittal.

2. Did the trial court err in calculating the loss amount and applicable guidelines in sentencing Petitioner?

An Appellate Court will review the application of the Sentencing Guidelines *de novo. United States v. Dean,* 59 F.3d 1479, 1494 (5th Cir. 1995), *cert. denied,* ___ U.S. ___, 116 S.Ct. 794 (1996); *United States v. Wimbish,* 980 F.2d 312, 313 (5th Cir. 1992), *cert. denied,* 508 U.S. 919 (1993).

During the course of Appellant's sentencing, the following exchange took place:

> MR. KLEINSCHMIDT: So when the government continues to say even today that the defendants used inferior products, inferior parts, inferior assembly techniques or whatever, I don't know that there was any evidence that that happened.
>
> THE COURT: I don't -- this Court has not used the word "inferior." I have used specifications that were

> specified in the contract. I have not made a finding on inferior, that they were inferior. That they were not in compliance with the contract and specifications called for.

At trial, Richard Dickerhoff indeed had testified that a Cummins 290 engine constructed with "all new OEM parts" would cost about $10,000. Mitch Ousley, also from TTP, testified that the same engine constructed of new or rebuilt OEM parts would cost $9,000 to $10,000. In its calculations, the District Court took the $9,000 figure, subtracted the $5,900 Jeff Moore paid for each engine and multiplied that product by 30 to arrive at the $93,000 loss figure. Even under that theory, the District Court failed to take into account the value of parts added to the engines before shipping them. That evidence was before the district court (testimony of Elmer Bruce, admitted into evidence at the sentencing hearing as Exhibit S-3), and the costs of shipping crates. The District Court's reasoning for excluding this evidence was that the parts added would have had to have been added to an engine which complied with contract requirements anyway, thus the defendants should not get credit for them.

As a general rule, a sentencing court is entitled to rely upon factual information in a presentence report where the defendant does not challenge the accuracy of the facts. Fed. R. Crim. Proc. 32(b)(6)(D); *United States v. Anaya*, 32 F.3d 308, 313 (7th Cir. 1994). The sentencing court may not, however, adopt conclusions in a PSI which are not supported by facts. *United States v. McMeen*, 49 F.3d 225, 226 (6th Cir. 1995); *United States v. Williams*, 41 F.3d 496, 499 (9th Cir. 1994). Fed. R. Crim. Proc. 32(C)(1) requires the sentencing court to make a finding as to disputed factual issues set forth in the PSI or make a determination that no finding is necessary. In this case, Rummel vigorously objected to the inaccurate hearsay statements followed and relied upon by the U.S. Probation Officer, as such unreliable assertions improperly shifts the burden, which is upon the prosecution to establish the existence of disputed facts by a preponderance of the evidence. *United States v. Greene*, 41 F.3d 383, 386 (8th Cir. 1994); *United States v. Hammer*, 3 F.3d 266, 268, 273 (8th Cir. 1993), *cert*

denied, ___ U.S. ___, 114 S. Ct. 1121 (1994). Rather than moving forward with evidence supporting its position, as called for in *United States v. Butler*, 41 F.3d 1435,1446 (11th Cir. 1995), the government simply made conclusionary remarks interspersed with italics and quotation marks. For example, in responding to Rummel's Objection No. 3, by stating "they *cheated and defrauded the Army* by 'hiding the ball' from the Army *through their routine concealment of their use of inferior quality parts* when rebuilding these diesel engines. It is submitted that this does not carry the government's burden of coming forward with evidence supporting its position.

The Fifth Circuit, while recognizing that a sentencing court must either make specific findings on contested facts in the PSI that the court determines relevant to sentencing, or determine that those controverted facts will not be considered at sentencing, *United States v. Puig-Infante*, 19 F.3d 929,943 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 180; *United States v. Hooten*, 942 F.2d 878, 881 (5th Cir. 1991), nevertheless holds that a defendant bears the burden of demonstrating the PSI inaccurate and materially untrue and holds that, in the absence of rebuttal evidence, the sentencing court may rely on the factual assertions in the PSI, *United States v. Patten*, 40 F.3d 774, 777 (5th Cir. 1994), but only if those facts have an adequate evidentiary basis, *Puig-Infante*, 19 F.3d at 943.

As vividly seen in the PSI in the instant case, this is tantamount to an improper and unauthorized shifting of the burden of proof to the defendant in connection with Fed. R. Crim. Proc. 32(c) as it is clear that the government bears the burden of proof to present evidence establishing facts leading to an enhancement of sentence by a preponderance of the evidence, *United States v. Narvaez*, 38 F.3d 162, 166 (5th Cir. 1994); *Makes Room*, 49 F.3d at 417; *Greene*, 41 F.3d at 386 and puts the Fifth Circuit in conflict with those Circuits.

Valuation requires a determination of fair market value with precision and based on reasonable estimates. U.S.S.G. § 2F1.1, Commentary, Application Note 7; U.S.S.G. § 2B1.1, Commentary, Application Note 2, requiring fair market value as standard unless unascertainable; *United States v. Thomas*, 973

F.2d 1153, 1159 (5th Cir. 1992), holding fair market value must be used unless ascertaining fair market value is impractical.; U.S.S.G. § 2B1.1, Commentary, Appl. Note 3. The cavalier approach taken here–simply deducting what TTP may have charged for some engines–does not arrive at fair market value.

The rule of lenity is a principle of statutory construction requiring that an ambiguous statute be construed in the manner most favorable to the defendant. *Bifulco v. United States*, 447 U.S. 381 (1980); *United States v. Martinez*, 946 F.2d 100, 102 (9th Cir. 1991). The rule of lenity has been held applicable to construction of the U.S. Sentencing Guidelines. *United States v. Blackburn*, 940 F.2d 107,109 (4th Cir. 1991); *U.S. v. Rivers*, 929 F.2d 136,139 (4th Cir. 1991), *cert. denied*, 502 U.S. 964.

Furthermore, the U.S. Probation Officer's Report, and AUSA Jarvis' arguments to the jury continually maintain that the contract was entered into by Rummel, *ab initio*, with the intent of defrauding the government. In fact, Mr. Elrod's testimony and the documents introduced in evidence by the government showed that Rummel was the manufacturing foreman at Texas Engine Exchange, the contract was awarded to the president, Mr. Bill Rucker.

The United States Probation Officer misunderstood the Indictment. Paragraph 1 of the Report states as follows: "On October 26, 1994 the grand jury for the Northern District of Texas, Fort Worth Division, returned a four count Indictment *charging Rummel*, and Jeff Moore and Eddie Moore with conspiracy, in violation of 18 U.S.C. § 371, and False Statements, in violation of 18 U.S.C. § 287 & 2. *The defendant was named in all counts.*" (Emph. supp.). The Probation Officer still maintains she may treat Rummel as though he had been charged, if not convicted, of the conspiracy count ignores all but a dozen lines of sworn testimony, and obviously wrote her report by simply copying the investigations reports.

Rummel respectfully requests that the Court consider the Objections filed to the Presentence Investigation Report and its Addendum as though fully set forth herein.

Most significantly, during the sentencing hearing, when Rummel specifically discussed the trial court's comment to the jury that he could figure out the difference between $10,000

and $6,000, pointed out that Dickerhoff was not talking about the *Government's contract* for engine but what he, at TTP, would consider a number 10 engine, and noted that Ousley had explained that a "10" would be a new Cummins engine in a crate which had never been opened or run, the trial court interrupted and the following statement was made:

> "Mr. Kleinschmidt: . . .And I'm asking the court to make a finding that the -- on the value --
>
> The Court: I'm making a finding on the value.
>
> Mr. Kleinschmidt: -- that the contract did not call for -- well, I think the appellate record needs to be clear that the contract didn't call for new crankshafts, new connecting rods or any of those kinds of parts to be new. They didn't even have to be replaced. As long as they met tolerance, they could be reused. Would the Court agree that that was what the contract called for?
>
> The Court: No."

The trial court erroneously rejected the fact that the written contract did not require TEXI to install "new crankshafts, new connecting rods, or any of those parts to be new."

Eight days later, on April 30, 1996, the trial court issued an Order stating as follows:

> "The Court issues this notice to clear up a matter about which there was some confusion during the sentencing hearing in this case. For purposes of sentencing, the Court's determination of the loss caused by defendants' offenses is based on its interpretation that the contract in question required the use of new or rebuilt OEM parts, except in the case of parts that the contract expressly required to be new and parts that were not required to be replaced."

This simply came too late. The sentence had been imposed.

It is submitted that trial court's application of the guidelines was "clearly erroneous."

In imposing sentence the trial judge erroneously assumed that the contract under which the engines were rebuilt required the use of new (expensive) parts when, in fact, it did not. When this was specifically raised at sentencing the trial

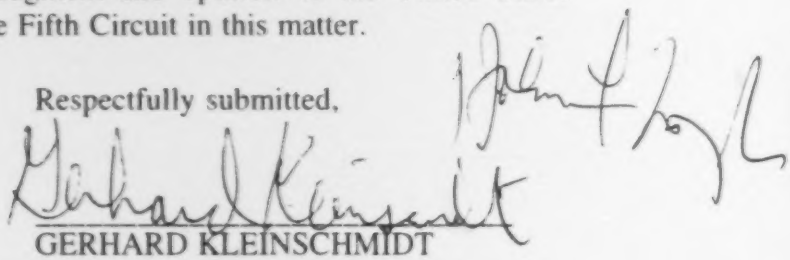
judge confirmed his belief that new parts were required. Subsequently, after imposing sentence, the trial court issued a letter to "clarify" his earlier statement. The U.S. Probation Officer's Report and the subsequent rulings by the trial court relied on the statements of investigators, and their understanding of the contract, as opposed to the actual contract itself and expressed his erroneous belief that compliance with the contract required the use of all new parts. He did not correct that until after sentencing. Therefore the "amount of loss" was overstated, resulting in application of a higher guideline level than what was appropriate under the facts of the case.

It is submitted that the Fifth Circuit clearly should have reversed and remanded for resentencing because, reviewing the application of the Sentencing Guidelines *de novo*, *v. Dean*, 59 F.3d at 1494, must find that, while the sentencing court did make a finding as to disputed factual issues set forth in the PSI under Fed. R. Crim. Proc. 32(C)(1), it erred in making that finding. If the purpose behind the Rule requiring trial courts to make specific findings is to permit the appellate court to review those findings, the Rule is frustrated when the sentence based on such an erroneous finding is affirmed. *Puig-Infante*, 19 F.3d at 943; *Hooten*, 942 F.2d at 878.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court Appeals for the Fifth Circuit in this matter.

Respectfully submitted,



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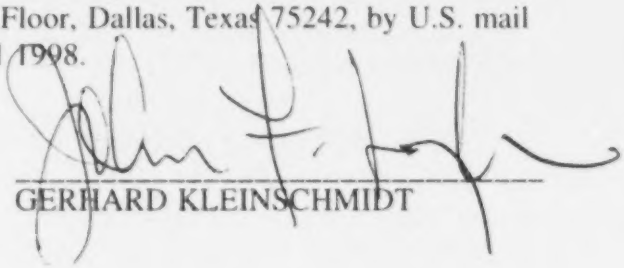
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

No. _____

JOHN EARL RUMMEL, Petitioner
V.
UNITED STATES OF AMERICA, Respondent.

Proof of Service

I hereby certify that a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI has been served upon the Solicitor General, Department of Justice, Washington, D.C. 20530, Clerk of the Supreme Court of the United States, 1 First Street, NE, Washington, D.C. 20543, and Assistant United States Attorney, Delonia Watson, 1100 Commerce Street, 3rd Floor, Dallas, Texas 75242, by U.S. mail this 24th day of April 1998.



GERHARD KLEINSCHMIDT

Appendix A

UNITED STATES COURT OF APPEALS
for the FIFTH CIRCUIT

No. 96-10518

UNITED STATES OF AMERICA,
VERSUS
JEFF D. MOORE; EDDIE C. MOORE;
JOHN EARL RUMMEL

Appeals from the United States District Court for the Northern District of Texas (4:94-CR-114-E)

"Before JOLLY, DAVIS and BARKSDALE, Circuit Judges.
PER CURIAM:*

We have carefully reviewed the record, the briefs and the argument of counsel and concluded that the evidence is more than sufficient to support the verdicts and that the district court committed no reversible error.

AFFIRMED.

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* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4."

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-10518

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

JEFF D. MOORE; EDDIE C. MOORE;
JOHN EARL RUMMEL
Defendants - Appellants

Appeals from the United States District Court for the
Northern District of Texas, Fort Worth

ON SUGGESTION FOR REHEARING EN BANC
(Opinion November 14, 1997, 5 Cir., ____, ___ F.3d ___)

Before JOLLY, DAVIS and BARKSDALE, Circuit Judges.

PER CURIUM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition of Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

Appendix C

CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * *

Title 18, United States Code, Section 2

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

* * * *

Title 18, United States Code, Section 287

§ 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined

not more than $10,000 or imprisoned not more than five years, or both.

* * * *

Title 18, United States Code, Section 371

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the Unite States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

* * * *

Title 28, United States Code, Section 1254(1)

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;